

ESTATE OF JOE (JOSE) ELVINO JUANCHO

IBIA 79-28

Decided December 4, 1979

Appeal from an order of Administrative Law Judge Patricia McDonald denying petition for rehearing.

Reversed and Remanded.

1. Administrative Procedure: Administrative Law Judges--Indian
Probate: Hearing: Full and Complete

When a party to an Indian probate proceeding appears without an attorney, the Administrative Law Judge has a duty not to be a mere umpire, but to see that all relevant facts are developed.

2. Administrative Procedure: Administrative Law Judges--Indian
Probate: Hearing: Full and Complete

Where a party to an Indian probate proceeding was not represented by counsel and was obviously unprepared for proper presentation of testimony and ignorant of significance of the facts, the Administrative Law Judge had the duty to see that all relevant facts and circumstances, both favorable and unfavorable to the parties, were brought out.

APPEARANCES: Tibo J. Chavez, Esq., and Thomas C. Garde, Esq., for Mary A. Lujan and Cecelia Cheromiah, appellants.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from Judge McDonald's order of January 19, 1979, denying petition for rehearing. The petition sought modification of an order issued October 31, 1978, determining heirs by removing Joann Christine Abeita as an heir on the ground she is not the child of the decedent.

Decedent, an unallotted member of the Isleta Pueblo Tribe, died intestate on August 25, 1975, possessed of certain trust or restricted property on the Salt River Indian Reservation in Arizona.

After a hearing held at the Southern Pueblos Agency, Albuquerque, New Mexico, on August 31, 1978, at which the appellants herein were not represented by counsel, the Judge issued order determining heirs on October 31, 1978, wherein she found the heirs of the decedent in accordance with the laws of the State of Arizona to be:

Mary A. Lujan	daughter	1/3
Cecelia Cheromiah	daughter	1/3
Joann Christine Abeita	daughter	1/3

The record establishes decedent's first wife to be Ramona Melchor who died in 1951, survived by the above-named heirs, Mary A. Lujan and Cecelia Cheromiah. It further establishes decedent's second wife to be Charlotte Stewart who died without issue in 1967. The Data of Heirship Finding and Family History prepared by the Bureau of Indian Affairs and testimony elicited from Juanita Abeita Jojola at the hearing, established that Juanita and the decedent lived together at some time or another and had planned to marry but did not because of decedent's death. The testimony of Juanita Jojola was that Joann Christine Abeita, 15 years of age on the date of hearing, was the natural child of Juanita.

On December 18, 1978, appellant through counsel filed petition for rehearing contending therein that the finding in the order determining heirs of October 31, 1978, that Joann Christine Abeita was an heir at law of the decedent was erroneous in view of information contained in letter dated November 28, 1978, from Diane M. Rodriguez, Acting Census Clerk, Southern Pueblos Agency, to Judge McDonald, a copy of which was attached to said petition. 1/

1/ This letter reads:

"Dear Miss McDonald:

"This letter is in reference to Miss Joann Christine Abeita, date of birth August 18, 1962, Census No. 1407 on the Isleta Pueblo Census roll. As of this date Miss Abeita has a birth certificate on file in the State Vital Records office in Santa Fe, New Mexico and this office, including only Juanita Abeita, as mother, on the legal Birth Certificate. I have also checked with the Vital Records office by telephone to see if the Birth Certificate was amended to include the father. It has not been amended so therefore, we cannot certify to legal paternity. Our office has no legal documentation to confirm Miss Abeita's claim that Mr. Jose Elvinio Juancho was her natural father.

"If you have need of further assistance in this matter please contact this office at the above address or call * * *.

"Sincerely yours,

"/s/ Diane M. Rodriguez

"Acting Census Clerk"

The Judge denied said petition on January 19, 1979, for the reason that the petition failed to comply with the requirements contained in Code of Federal Regulation, Title 43, section 4.241(a), in the following respects:

(a) The Petition is not under oath of the aggrieved parties.

(b) The Petition falls to state specifically and concisely the grounds upon which it is based. Petitioners apparently believe the decision was based solely on the information contained on the Data for Heirship Finding and Family History form wherein Joann is listed as a child of the decedent and Juanita Abeita. After the Order Determining Heirs was entered, petitioners obtained a letter, from an acting census clerk stating that Joann Christine Abeita's birth certificate does not include the name of her father, and that no legal documentation of parentage is filed with the census office. Petitioners argue that on the basis of the assertions made in this letter, a new finding should be made that Mary Lujan and Cecelia Cheromiah are the only daughters and heirs of the decedent. This argument overlooks the fact that at the hearing, where Mary Lujan, Cecelia Cheromiah, Juanita Abeita, and Joann Abeita were present, there was direct uncontroverted sworn testimony by Juanita Abeita that the decedent was the father of Joann Abeita. In addition, the undersigned Judge, towards the close of the hearing, recapped the testimony and mentioned three children, then appointed Juanita Abeita as guardian ad litem for Joann explaining that her duty was to protect Joann's interest in this estate. Petitioners herein took part in that hearing and expressed no surprise at the testimony offered or the direction of the proceedings. They failed to object to or attempt to controvert the evidence given that Joann is also the child of their father, the decedent.

(c) The Petition does not claim to be based on new evidence. However, even if the letter from the acting census clerk were construed as new evidence, the Petition must fail as it is not accompanied by the required affidavits and it does not state justifiable reasons for petitioners' failure to earlier present the evidence, tendered as new, on which they now seek to rely.

For all of the above reasons, the Petition for Rehearing is denied for failure to state adequate ground for rehearing and for failure to comply with the requirements for such petition as set forth in 43 CFR 4.241(a).

This decision is final for the Department and the Order Determining Heirs entered herein on October 31, 1978, remains in full force and effect.

In their notice of appeal, appellants through counsel allege in substance as grounds for error that Mary Lujan had advised the Administrative Law Judge at the hearing that they were contesting the allegation that Joann Christine Abeita was the daughter of the decedent; and among other things were dissatisfied with the hearing and the manner in which it was conducted.

The Board agrees with Judge McDonald that the petition did not comport with the technical requirements of 43 CFR 4.241(a). However, this does not preclude the Board from exercising the inherent authority of the Secretary of the Interior to correct a manifest injustice or error where appropriate. See 43 CFR 4.290 as amended February 9, 1978. The Board finds that Judge McDonald's denial of appellants' petition for rehearing was not based on an objective evaluation of the hearing to determine heirs. As more fully set forth below, we find the hearing in question was not full and complete.

[1] When a party to an Indian probate proceeding appears without counsel, the Administrative Law Judge has a duty not to be a mere umpire, but to see that all relevant facts are developed. See Estate of Peahner (Mabel) Mahseet, 5 IBIA 27 (1976); Stewart v. Cohen, 309 F. Supp. 673 (D.C. N.Y. 1970). This does not appear to have occurred in the present case. Moreover, the notice of hearing issued to all parties did not advise them of their right to counsel. (The standard notice of hearing form was revised in 1974 to include reference to this right.)

[2] Where a party to a probate proceeding was not represented by counsel, and was obviously unprepared for proper presentation of testimony and ignorant of significance of the facts, the Administrative Law Judge had the duty to see that all relevant facts and circumstances, both favorable and unfavorable to the parties, were brought out. Cf. Coyle v. Gardner, 298 F. Supp. 609 (D.C. Haw. 1969).

From a review of the record it appears that the appellants were unprepared for the proper presentation of testimony and ignorant of significance of the facts. Moreover, it appears that appellants were not aware or familiar with Departmental procedural requirements. In addition, the scanty verbatim transcript raises grave doubt that all relevant facts and circumstances, both favorable and unfavorable to claimants, were brought out by the Administrative Law Judge.

An Administrative Law Judge has a duty to develop a complete record. No such record was developed here.

For example, looking at the transcript, it is difficult to ascertain the testimony attributable to each witness. Juanita Abieta's relationship with the decedent was apparently not explored in depth. The apparent discrepancy existent with regard to the relationship between decedent and his second wife, Charlotte Stewart, who died in 1967 and Juanita Abieta Jojola and Joann Christine Abieta was also not explored in depth.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order determining heirs issued October 31, 1978, is reversed and the matter is remanded for a hearing de novo on all issues.

Mitchell J. Sabagh
Administrative Judge

We concur:

Franklin Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge